IN THE SUPREME COURT OF MISSOURI

No. SC83747

CHESTERFIELD VILLAGE, INC.

Appellant,

v.

CITY OF CHESTERFIELD, MISSOURI,

Respondent.

Appeal from the Circuit Court of the County of St. Louis

Division No. 14

The Honorable James R. Hartenbach

BRIEF AMICI CURIAE OF MISSOURI MUNICIPAL LEAGUE and ST. LOUIS COUNTY MUNICIPAL LEAGUE

Daniel G. Vogel Mo. Bar #39563
Paul A. Campo Mo. Bar #48611
Leslye M. Winslow Mo. Bar #49713
STINSON, MAG & FIZZELL, P.C.
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Telephone: (314) 259-4500
Facsimile: (314) 259-4599

Attorneys for Amici Curiae
Missouri Municipal League and
St. Louis County Municipal League

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INTEREST OF AMICI CURIAE

The Missouri Municipal League is an association of 618 municipalities in the State of Missouri. The St. Louis County Municipal League is an association of 84 municipalities in St. Louis County and the City of St. Louis. The Municipal Leagues provide a vehicle for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common destiny of municipalities' citizens. This Court granted St. Louis County Municipal League's prior motion to file its Amicus Suggestions in support of transfer of this action to this Court.

The Municipal Leagues believe that the Court's decision in this case could have a serious impact on duplicative litigation ordinarily barred by the doctrine of res judicata. The Municipal Leagues believe that the issue of the application of the doctrine of res judicata to this case was correctly decided by the trial court's dismissal of Appellant's First Amended Petition and that this significant aspect of the case, the significant interests of the public and all local governments are not fully represented by the parties to the case. Therefore, the Municipal Leagues support the other Points Relied on as argued by Respondent City of Chesterfield, but respectfully submit this additional discussion and argument on the issue of res judicata.

JURISDICTIONAL STATEMENT

Amici Curiae Missouri Municipal League and St. Louis County Municipal League adopt the jurisdictional statement of Respondent City of Chesterfield.

STATEMENT OF FACTS

Amici Curiae Missouri Municipal League and St. Louis County Municipal League adopt the statement of facts of Respondent City of Chesterfield.

POINT RELIED ON

I. THE TRIAL COURT PROPERLY GRANTED THE CITY'S MOTION TO DISMISS APPELLANT'S FIRST AMENDED PETITION FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED BECAUSE APPELLANT'S CLAIMS WERE BARRED BY RES JUDICATA IN THAT THEY WERE BASED ON THE SAME FACTUAL CIRCUMSTANCES THAT WERE THE SUBJECT OF A PREVIOUS ACTION AND RESULTING JUDGMENT ON THE MERITS AND COULD HAVE BEEN ASSERTED THEREIN.

Elam v. City of St. Ann, 784 S.W.2d 330 (Mo. App. E.D. 1990).

Johnson v. City of Glencoe, 722 F.2d 432 (8th Cir. 1983)

Tensor Group v. City of Glendale, 14 Cal. App. 4th 154, 17 Cal. Rptr. 2d 639 (1993).

Winter v. Northcutt, 879 S.W.2d 701 (Mo. App. S.D. 1994).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE CITY'S MOTION TO DISMISS APPELLANT'S FIRST AMENDED PETITION FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED BECAUSE APPELLANT'S CLAIMS WERE BARRED BY RES JUDICATA IN THAT THEY WERE BASED ON THE SAME FACTUAL CIRCUMSTANCES THAT WERE THE SUBJECT OF A PREVIOUS ACTION AND RESULTING JUDGMENT ON THE MERITS AND COULD HAVE BEEN ASSERTED THEREIN.

A. Introduction.

This case arises from a land use dispute between a prospective developer and a municipality as to the appropriate zoning category for a specific parcel of land. The City of Chesterfield denied a request for a change in the zoning to a specific higher density category in February 1995. In March 1995, Appellant filed a suit for declaratory and injunctive relief against the City challenging the refusal to change the zoning. In April, 1996, the circuit court determined that the current zoning was inappropriate and ordered a change in zoning. The City of Chesterfield promptly complied with the court order and rezoned the property in June 1996, granting the relief sought by Appellant. Remarkably, three years later, on June 6, 1999, Appellant filed a second suit seeking damages for inverse condemnation/taking and pursuant to 42 U.S.C. § 1983. Appellant's second suit was premised on the same failure to rezone the property that was the subject of the

original lawsuit and for which Appellant had already received the relief it had sought. Resp. Br. at 16-18; 65.

The City moved to dismiss the second lawsuit arguing, inter alia, that no cause of action exists for a temporary taking under these circumstances and that the doctrine of res judicata clearly barred the second action. The trial court thereafter granted the dismissal and Appellant has appealed.

The Municipal Leagues fully endorse the City's position challenging any attempt to make new law by creating a temporary taking action in every zoning or other dispute in which the City does not prevail. Such a course of action is clearly not contemplated by the prior judicial precedent. See Elam v. City of St. Ann, 784 S.W.2d 330, 336 (Mo.App. E.D. 1990) (acknowledging "skepticism whether inverse condemnation may ever result from the application of a Missouri zoning law."); First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 322 (1987) (expressly precluding expansion of the recognized temporary taking action beyond the facts at issue which "of course do[es] not deal with the quite different question that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."); Pheasant Ridge Corp. v. Township of Warren, 777 A.2d 334, 343 (N.J. 2001) ("per se compensable taking does not occur as a result of the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority.")

The Municipal Leagues file this Amici Curiae Brief, however, specifically to address Appellant's attempt to create an equally noxious exception to res judicata that

would allow and encourage duplicative lawsuits in virtually every zoning dispute and permit denial -- a rule that would serve as a sword only against public entities and in direct contravention of existing Missouri precedent.

Accordingly, the Municipal Leagues urge this court to affirm the trial court and maintain the rule that a party who litigates to a judgment is bound by the doctrine of res judicata and may not thereafter seek other relief in a new lawsuit based on the same transaction or occurrence.

B. The Elements of Res Judicata.

This Court has stated that res judicata applies where the following elements exist: 1) the identity of the thing sued for; 2) the identity of the cause of action; 3) the identity of the persons and parties to the action; and 4) the identity of the quality of the person for or against whom the claim is made. King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495, 501 (Mo. banc 1991). Res judicata applies

> "not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Id. (emphasis added) (citations omitted).

The "Identity of the thing sued for" has been interpreted to mean only that the two suits have the same subject matter. Winter v. Northcutt, 879 S.W.2d 701, 708 (Mo. App.

S.D. 1994). Thus, the first element is satisfied even where the relief sought is different in each action. Id. (damages action was barred by prior action for relief for quiet title).

Similarly, in determining whether a new action is barred as the same "cause of action" under the second element, the question is whether the claim arises out of the same "act, contract or transaction." Grue v. Hensley, 210 S.W.2d 7, 10 (Mo. 1948). Both the terms "cause of action" and "transaction" are interpreted broadly to bar claims arising from the same "aggregate of all the circumstances" regardless of the "*form"* of the second action. Id. (emphasis in original).

In this case, Appellant appears to claim that res judicata does not apply because (1) the relief sued for by the City of Chesterfield is not identical to that sought in the prior action, and (2) the second action for damages allegedly could not have been brought in the first case. Review of Missouri law, law of other jurisdictions, and common litigation practice unequivocally provides that Appellant's contention is simply not correct.

C. Appellant's claims for damages and Constitutional violations could have been brought in the first lawsuit and are therefore barred by res judicata.

Appellant's second lawsuit clearly met the requirements for application of res judicata articulated in King General Contractors, supra. Appellant's original injunction action and its subsequent damages action both have the same "subject matter" and arise from the same "cause of action" or "transaction" – a challenge to the City's initial zoning of the property. As noted in the abundant cases cited below, second actions on the same

subject matter or transaction but seeking different relief, such as damages, are equally barred by res judicata.

To accept appellant's argument that res judicata does not apply to this case would destroy the finality of judgments against municipalities and other governmental entities in virtually every case challenging a denial of a claimed right by governmental action. In every case in which a permit or license denial, zoning, or other regulation was challenged, the Appellant could wait for years and file a new claim for new remedies -- as long as they were not the "identical" remedies sought in the first action. No judgment would ever be final when the government was a defendant.

Fortunately, the Court need not expend considerable time debating the public policy impact of Appellant's requested ruling as it directly conflicts with the trial court's decision and abundant Missouri and other precedent applying res judicata to damages or other Constitutional actions brought after a judgment challenging a municipal ordinance.

(1) Appellant's argument directly contradicts Missouri precedent such as Elam v. City of St. Ann that apply res judicata to takings and other Constitutional claims based on zoning.

There is no question that the Section 1983/takings claim here is based on the exact same event or transaction as the original claim – i.e., the failure of the City to rezone to a new zoning classification. In Elam v. City of St. Ann, 784 S.W.2d. 330 (Mo.App. 1990), the court dealt with very similar claims in which the city's zoning and refusal to change the zoning were adjudicated in an initial action in 1985. The Elam's thereafter filed a

new suit claiming that the zoning constituted a taking and violated due process under the Missouri and federal constitution. On appeal, the court held that the doctrine of res judicata barred relitigation of a claim based on the reasonableness of the zoning on or before the date of the judgment in the first case. Specifically, the court held:

> The reasonableness of the residential zoning thus became res judicata in November of 1985, when, on remand, the trial court issued the injunction requested by the City.

Id., at 333. The Court noted, however, that res judicata did not preclude "reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." Id. Thus, while the takings claim was barred relative to the zoning prior to November 1985, the parties could raise a new claim that the zoning had, subsequent to the first judgment, become unreasonable due to the changes in development after the date of the first judgment. Id. at 334. In sum, the court expressly precluded new claims based on application of the zoning prior to the judgment and considered (and ultimately rejected) a takings claim only for the period after the judgment.

In this case, Appellant is similarly barred by res judicata from asserting its Section 1983/takings claims based on application of the zoning prior to the judgment in April 1996. The holding in Elam bars any such claims and preserves, if at all, only a claim arising from a new application of the zoning that transpired after the judgment. Thus, while res judicata would not necessarily bar Appellant from claims based on injury alleged from the new zoning, Appellant cannot be allowed to relitigate any claim that it

could have asserted prior to the original judgment. This relitigation of claims based on application of the zoning prior to the original judgment was expressly rejected in Elam, supra.

Appellant contends that res judicata does not apply because the relief sought in the two cases was different. Appellant does not cite any authority for this contention and the argument has clearly and unequivocally been rejected in scores of cases barring damages actions that follow a prior case seeking injunctive or other similar relief. E.g., Winter v. Northcutt, supra (holding that where a party seeks declaratory judgment and injunctive relief, res judicata bars subsequent action for damages); Cimasi v. City of Fenton, 838 F.2d 298 (8th Cir. 1988) (holding that prior declaratory and injunction action invalidating ordinance precluded plaintiff's second suit for Section 1983 damages). See also additional cases cited in subsections (2) and (3) below.

Appellant's claim for damages for constitutional violations based on application of the zoning prior to the first judgment for declaratory and injunctive relief is therefore barred.[1]

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[1] Even assuming a partial takings claim as alleged could even state a claim based on a temporary failure to properly zone land, here the zoning was changed within weeks of the trial court ruling. Accordingly, as in Elam, this court could find that as a matter of law no claim of taking existed, as the period of weeks between the first judgment and the change in zoning could not itself constitute a taking under any circumstances. See Pheasant Ridge Corp. v. Township of Warren, 777 A.2d 334, 343 (N.J. 2001) ("per se compensable taking does not occur as a result of

(2) Appellant's second action is not based on a "new" factual situation that would preclude application of res judicata.

Appellant urges this Court to create what would be a new exception to res judicata by granting a property owner the right to sue a city to enjoin enforcement of a city's zoning decision in one action - obtain the relief sought - and years later after finality of that judgment, sue the city yet a second time on the same zoning to seek damages. Appellant relies on the non-controversial proposition that res judicata does not bar subsequent litigation where new facts have occurred which alter the legal rights or relations of litigants. This "exception" to res judicata simply acknowledges that a new cause of action may be brought relating to the same ordinance or contract, for example, if a subsequent application, breach, or violation occurs after a judgment – it does not, however, allow relitigation of the events or claims available prior to the judgment. This point was made clear in the Elam decision.

Nevertheless, Appellant claims that the new "fact" which allows a new cause of action is that "Chesterfield Village could not have known when, or even if, the City would rezone the parcel." Resp. Br. at 69. Appellant concedes that no Missouri case expressly supports the proposition it makes regarding its claimed exemption from res judicata. Resp. Br. at 71. But more importantly, the argument is nonsensical given that

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the temporary application of a zoning ordinance that is ultimately declared invalid in a judicial challenge to the municipal zoning authority.")

the action brought by Chesterfield Village was in fact to enjoin the City to change the zoning – the same event or "fact" it now claims was unforeseeable. Assuming that Appellant filed its lawsuit in the good faith belief that the zoning was unreasonable, there was simply no doubt that the City would have to rezone if Appellant prevailed as to do otherwise would be in contempt of court.

In Missouri, a zoning that is "confiscatory" is beyond the authority of the City. Thus, if Appellant was correct that the zoning was a confiscatory taking of property, the zoning had to be changed as a matter of state law and could never result in permanent taking under any circumstances. For this reason, the Elam court acknowledged the skepticism that there could ever be a compensable inverse condemnation claim from a typical failure to rezone because such zoning is unauthorized in Missouri (and therefore would always be enjoined). See Elam, 784 S.W.2d at 337.

Here, Appellant knew of its alleged claims, knew that if it prevailed the City would in fact have to rezone, and yet chose to wait until three years after the judgment and rezoning to assert a claim for damages for the initial zoning. As such, the rezoning was not a new "fact" arising after the original judgment – but rather the very relief sought and obtained in the original action!

Furthermore, even assuming a claim for damages ever exists for the period in which a denial of rezoning was being challenged, knowing which zoning category the City ultimately grants is simply irrelevant to a temporary taking claim. Either Appellant has been denied all use of its property during the interim period under circumstances that could require compensation -- or it has not. The City could not alter the amount of

"temporary taking" damages by its subsequent zoning action any more than a government condemning land can alter the compensation ultimately due by rezoning the land after the initial condemnation order. Once the "confiscatory" zoning is remedied by injunction (the only remedy necessary in this context), the alleged damages cease, and such past damages are in no way increased or decreased based on the lawful uses of the future.

Appellant cites no controlling authority on how to calculate damages in a temporary taking based on a temporary failure to rezone. This is because, as discussed in the City's brief, such a cause of action has never been recognized and simply does not and should not exist in this context. Nevertheless, in a context where a temporary takings claim was held to exist, the United States Supreme Court determined that the proper measure of damages for a temporary taking was the "rental that probably could have been obtained" and not the "difference between the market value of the fee on the date of the taking and its market value on the date of its return." Kimball Laundry Co. v. U.S., 338 U.S. 1 (1949). Thus, even if a damages claim exists, the damages are simply not dependent on the value of the property in the future or in any way dependent on the value of the use of the property once the taking is eliminated.

Moreover, even if there is a lack of certainty as to the amount of or duration of a harm, this is simply not a basis for ignoring res judicata in Missouri. See, e.g., Grue v. Hensley, 210 S.W.2d 7, 10 (Mo. 1948) (holding that finality of a judgment is not suspended simply because the plaintiff does not know when the breach or violation will end – instead, plaintiff must "include all such claims as had come due when the action was brought.") C.f. Polytech, Inc. v. Sedgwick James, Inc., 937 S.W.2d 309, 311

(Mo.App. 1996) (holding that a cause of action for damages accrues when the "fact of damages, not the precise amount" is ascertainable.) By analogy, the plaintiff in a takings action is no different than a plaintiff in a contract action. Damages from a breach may be ongoing and uncertain in duration. Such “uncertainty,” however, does not allow a suit for injunctive or specific performance to be followed years later by a damages action when the plaintiff is not satisfied with the relief sought and obtained in the first action. Rather, the plaintiff must allege and seek the preexisting and ongoing damages or be satisfied with injunctive relief alone.

In sum, regardless of any entitlement to the damages, Appellant simply did not need to wait three years to allege its claims and should have asserted them in the initial action.

(3) Takings and other constitutional claims based on zoning are claims that can be brought in an initial zoning action and are therefore subject to res judicata.

Appellant also urges this court to ignore Elam, supra, claiming that it could not have brought a takings or other Constitutional claim in the original action because the validity of the zoning had not yet been adjudicated. Appellant claims that until the

challenge to the zoning was adjudicated (1) its constitutional claims were not ripe[2], and (2) it could not know how much or how long it would suffer taking damages. The latter argument is the same argument as discussed above and should be similarly rejected. As discussed below, Appellant's contention that a takings or other Constitutional claim cannot be raised in an initial action has been rejected in a multitude of cases.

The Elam decision itself, contradicts Appellant's claim that adjudication of the zoning must occur prior to the claim for taking. In Elam, supra, the court expressly reviewed a takings claim based on the application of zoning under new circumstances occurring after the prior judgment. Yet, no adjudication of the validity of the zoning in light of the post-judgment circumstances had yet occurred. Rather, the court determined the validity of the post-judgment zoning and whether it constituted a taking in the same legal action. Accordingly, if Appellant's contention was correct, the Elam court could not have reached the takings claim (and Elam could not have asserted it) but would have been required to wait until the validity of the post-judgment zoning had been first decided in that action and then file a separate takings claim. The fact that the Elam court expressly addressed and rejected on the merits a takings claim without a prior

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[2] Appellant appears to confuse ripeness in obtaining a "final" decision before the legislative body with exhaustion of state remedies, neither of which are at issue in this appeal.

adjudication of the validity of the post-judgment zoning unequivocally disposes of Appellant's position that a takings claim cannot be raised in an initial lawsuit.

Appellant's contention that its present Section 1983/takings claims could not have been asserted simultaneous to a zoning challenge is also wholly contradicted by the plethora of cases in which the plaintiff does just that in decisions across the country. E.g., Monterey v. Del Monte Dunes at Montery, LTD., 526 U.S. 687 (1999) (damages claim based on zoning upheld in initial action); Pheasant Ridge Corp. v. Township of Warren, 777 A.2d 334 (N.J. 2001) (suit challenging validity of zoning ordinance and for damages for temporary takings asserted in single initial action); and similarly, in Missouri, Lenette Realty & Investment Co. v. City of Chesterfield, 35 S.W.3d 399 (Mo. App. E.D. 2000) (challenge to validity of zoning ordinance raised *and ruled on* in same initial action as federal damages claim); Wells & Highway 21 Corp. v. Yates, 897 S.W.2d 56 (Mo. App. E.D. 1995) (trial court considered appeal of denial of a variance and challenge to zoning classification in the same action as a regulatory takings claim); Hoffman v. City of Town and Country, 831 S.W.2d 223 (Mo. App. E.D. 1992) (trial court considered challenge to zoning and request for injunction in same action as takings claim). Thus, throughout the country, throughout Missouri, and even in the City of Chesterfield, other litigants have understood the barriers of res judicata and have pleaded claims for damages for denial of rezonings in the same initial action in which the validity of the zoning is challenged – an act that Appellant claims is not possible to do!

The exception to res judicata sought by Appellant has also been expressly rejected by numerous decisions in other jurisdictions which have held that a second suit seeking

damages for takings or other constitutional violations, after successfully invalidating zoning ordinances, is barred by res judicata. Johnson v. City of Glencoe, 722 F.2d 432, 433 (8th Cir. 1983) (holding that state injunction action on zoning barred subsequent takings damages claim); Ward v. Village of Ridgewood, 531 F.Supp 470 (D.N.J. 1982) (res judicata barred damage action under §1983 in federal court even though only injunctive relief had been sought in state court proceedings); Tensor Group v. City of Glendale, 14 Cal. App.4th 154, 17 Cal. Rptr. 2d 639 (1993) (state court injunction action enjoining zoning precluded subsequent inverse condemnation damages claim). C.f., Clark v. Yosemite Community College Dist. 785 F.2d 781, 787 (9th Cir. 1986) (state court mandamus action barred subsequent Section 1983 damages claims).

For example, in Johnson, supra, the plaintiff sued in state court challenging application of a zoning ordinance claimed to be a taking of plaintiff's property. The state court granted an injunction blocking enforcement of the zoning as to plaintiff. Johnson, 722 F.2d at 433. Plaintiff thereafter filed a Section 1983 claim for damages for unconstitutional taking in federal court. Id. The Eighth Circuit affirmed dismissal of the second suit on the grounds that the action was barred by res judicata. Id. These basic facts, of course, are identical to the present case.

Similarly, in Tensor Group, supra, a landowner challenged a city's interim development ordinances prohibiting the issuance of a building permit. The landowner challenged the validity of the ordinances, and the court enjoined the City's enforcement. Approximately two years later, the landowner filed an inverse condemnation action based

upon a partial taking for the period of time that the ordinances were in effect. The city argued that this suit was barred by res judicata. The court agreed, holding:

> The injury [landowner] sought to redress by the prior action was the limitation placed on its use of its property by the City's moratorium ordinances. This injury or primary right is identical to that being propounded in [landowner's] complaint for inverse condemnation.

Tensor, 17 Cal. Rptr. 2d at 643.

Numerous other courts in Missouri and elsewhere have consistently held that a damages claim based on an invalidated governmental act or ordinance is barred by res judicata if not asserted in the initial action challenging the act or ordinance. E.g., Cimasi v. City of Fenton, 838 F.2d 298 (8th Cir. 1988) (federal damages claim barred by res judicata where asserted in second action following suit for declaratory and injunctive relief); Minneapolis Auto Parts Co. v. City of Minneapolis, 739 F.2d 408 (8th Cir. 1984) (res judicata barred Section 1983 claim for damages filed after declaratory relief and injunction granted on unlawful denial of business license); Stericycle, Inc. v. City of Delavan, 120 F.3d 657 (7th Cir. 1997) (res judicata barred Section 1983 damages claim in action filed after suit obtaining injunction and declaring ordinance unconstitutional).

The trial court's dismissal of Appellant's second lawsuit should be affirmed as it sought relief based on the same transaction, right or injury that was the subject of the first action to enjoin enforcement of the zoning. To the extent any damage claim exists or could be pleaded, there is no doubt that such claims must have been asserted in the initial challenge to the zoning. Having failed to do so, Appellant's second lawsuit is barred.

(4) The Eleventh Circuit decisions relied on by Appellant are dependent on application of Florida state law and have been otherwise disregarded.

To rebut the obvious weight of judicial authority to the contrary, Appellant relies primarily on just two Eleventh Circuit decisions interpreting Florida law to support its argument that the developer's injunction suit against the City, which had become a final judgment in favor of the developer, did not bar a subsequent takings claim. Both Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999) and Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990), depend on applicable requirements of Florida land use law having no relationship to this case.

In Agripost, supra, the county revoked a waste disposal plant's operating permit because it was causing a nuisance. The company exhausted its administrative remedies before the county zoning board of appeals and thereafter administratively appealed the decision by writ of certiorari to the state circuit court which affirmed the revocation of the permit. The company then filed suit in federal court seeking damages for a taking under the Fifth and Fourteenth Amendments. The federal district court dismissed the case, and the Eleventh Circuit affirmed, on the basis that the federal claims were unripe due to a failure to allege an inadequate Florida court process for obtaining just compensation. Agripost, 195 F.3d at 1234. Although dismissing the case, the court in dicta stated that these federal claims were not barred by res judicata because they could not have been presented in the state administrative procedure.

Appellant incorrectly cites this dicta in Agripost for the proposition that the plaintiff here could not bring a takings claim "until judicial review of the zoning board's

decision." App. Br. at 73. The statements in Agripost were dependent on specific Florida law which states that an administrative permit revocation is not "effective" (and thus cannot effect a taking) until the circuit court affirms and the Florida District Court of Appeals denies review. Agripost, 195 F.3d at 1232 n.16. Because the revocation had not even become "effective" during the state court administrative appeal, the Florida appellant could not have claimed that a revocation had yet occurred that "rendered its property worthless." Id. Unlike the administrative action in Florida, there is no "time lag" before a legislative zoning or refusal to rezone is "effective." See id. at 1233 (noting difference between legislative denial and permit revocation even under Florida law.) Thus, the exhaustion requirement in Florida for an administrative permit simply has no bearing on the established application of res judicata to challenges to ordinances in Missouri.

Corn, supra, similarly depends on the application of Florida law applicable to a state mandamus action and has been soundly criticized even by its own author to the extent of its dicta. In Corn, plaintiff sought a writ of mandamus in state court to challenge ordinances that prevented his site development plan from being accepted and processed. Corn, 904 F.2d at 586. Although the original action included a claim for damages, "Corn dismissed a claim for inverse condemnation in response to a contention by the City" that Florida state courts did not permit such an action. Id. The state court affirmed the issuance of the writ invalidating the ordinance and the plaintiff then filed a federal court case under 42 U.S.C. § 1983 seeking compensation for the temporary taking. Id. In applying Florida mandamus law, the court decided that elements

"necessary to maintain the action for taking in Corn II are different from those necessary to sustain the mandamus action in Corn I." In addition, because Florida also had no state compensation remedy (at that time), res judicata did not apply in that case and the takings claim was otherwise ripe in federal court. Id. at 587-88. In light of the City's own contention that the damages claim could not be raised in the first case, the Court's result, regardless of its reasoning under Florida law, is understandable.

Nevertheless, the reasoning and dicta relied on by Appellant have been distinguished and its dicta repudiated by subsequent opinions including one by the author of Corn. See e.g., Reahard v. Lee County, 30 F.3d 1412, 1417 n. 12 (11th Cir. 1994)(noting criticisms of Corn and limiting its application); New Port Largo, Inc. v. Monroe County, 985 F.2d. 1488, 1498-1502 (11th Cir. 1992) (Edmondson, J. specially concurring) (author of Corn acknowledging that "Corn erred in improperly expanding Williamson's final decision requirement."). See also Treister v. City of Miami, 893 F. Supp. 1057, 1064-68 (S.D. Fla. 1992) (rejecting application of Corn II in holding that a de novo state court challenge to a zoning was in fact res judicata to a subsequent takings challenge to the same zoning).

Corn and Agripost are not cases that this Court can rely on, lest it becomes involved in the quagmire of Federal takings law as applied to Florida land use procedures. As the cases apply different state law, different claims based on administrative or ministerial acts, and the cited dicta has been criticized or rejected. In short, they provide no support to establish new Missouri law or to contradict this wealth of applicable cases cited above.

CONCLUSION

For the foregoing reasons, Amici Curiae Missouri Municipal League and St. Louis County Municipal League respectfully urge this Court to affirm the trial court's decision.

Respectfully Submitted,

STINSON, MAG & FIZZELL, P.C.

By: _____

Daniel G. Vogel, Mo. Bar #39563
Paul A. Campo, Mo. Bar #48611
Leslye M. Winslow, Mo. Bar #49713
100 South Fourth Street, Suite 700
St. Louis, Missouri 63102
Telephone: (314) 259-4500
Facsimile: (314) 259-4599

Attorneys for Amici Curiae
Missouri Municipal League and
St. Louis County Municipal League

CERTIFICATE PURSUANT TO RULE 84.06(c) AND (g)

I, _____, hereby depose and state as follows:

1. I am an attorney for Amici Curiae Missouri Municipal League and St. Louis County Municipal League.

2. I certify that the foregoing Brief of Amici Curiae Missouri Municipal League and St. Louis County Municipal League contains 6,178 words and 582 lines (including footnotes) and thereby complies with the word and line limitations contained in Missouri Rule of Civil Procedure 84.06(b).

3. In preparing this Certificate, I relied upon the word count function of the Microsoft Word 2000 word processing software.

4. I further certify that the accompanying floppy disk containing a copy of the foregoing Brief of Amici Curiae has been scanned for viruses and is virus-free.

_____

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2001, a copy of the foregoing document was sent by United States Mail, postage pre-paid, to:

Peter Herzog
Michael A. Vitale
Tammy King
Herzog, Crebs & McGhee, L.L.P.
One City Centre
515 N. Sixth Street, 24th Floor
St. Louis, Missouri 63101

ATTORNEYS FOR APPELLANT

Douglas R. Beach
Robert M. Heggie
Beach, Stewart, Heggie, Mittleman, L.L.C.
222 South Central Avenue, Suite 900
St. Louis, Missouri 63105

ATTORNEYS FOR RESPONDENT

Alan Kohn
One Firstar Plaza, Suite 2410
St. Louis, Missouri 63101

James S. Burling
Pacific Legal Foundation
10360 Old Placerville Road, Suite 100
Sacramento, California 95827

ATTORNEYS FOR AMICUS CURIAE
PACIFIC LEGAL FOUNDATION

_____